the 800 MHz spectrum rights surrendered by Nextel, (b) Nextel's costs in reconfiguring the 800 MHz band and (c) the cost of clearing the 1.9 GHz band of incumbent licenses.[136]

1. Challenges to the Grant of 1.9 GHz Spectrum Rights

60. Several petitioners have challenged the Commission's decision assigning 1.9 GHz spectrum rights to Nextel,[137] arguing that:

- the Commission impermissibly relied on Sections 151 and 303 of the Communications Act of 1934, as amended (Act)[138] in compensating Nextel with 1.9 GHz spectrum rights;[139]
- the Commission's authority under Section 316 of the Act does not extend to the license modifications ordered in this proceeding;[140]
- the Commission's objectives of promoting competition through competitive bidding, achieving regulatory parity and fostering diversity of ownership pursuant to Sections 309(j), 332 and 257 of the Act[141] preclude assigning spectrum rights to Nextel as part of 800 MHz band reconfiguration plan;[142] and
- assigning 1.9 GHz spectrum to Nextel implicates the Anti-Deficiency Act (ADA) and the Miscellaneous Receipts Act (MRA).[143]

a. The Commission's Authority

61. Coastal argues that the Commission impermissibly relied on Sections 151 and 303 of the Act in compensating Nextel with replacement spectrum and, therefore, that assigning 1.9 GHz spectrum to

[136] *See* n.71 *supra*. Several parties—notably the Consensus Parties—averred that band reconfiguration could not be achieved unless Nextel was suitably compensated. *Id.*, 19 FCC Rcd at 15104-12 ¶¶ 277-297. We describe the Consensus Parties at n. 70 *supra*.

[137] *But see* Opposition and Comments of Nextel Communications, Inc. Regarding Petitions for Reconsideration, filed April 21, 2005 (Nextel Opposition) at 20-22.

[138] 47 U.S.C. § 151 (listing one of the Act's central purposes as "promoting safety of life and property through the use of wire and radio communication"). *See also* 47 U.S.C. § 303 (instructing the Commission to assign frequencies to individual stations as the public convenience, interest or necessity requires).

[139] *See* Coastal PFR (of R&O) at 12-17.

[140] *See* Petition for Partial Reconsideration of James A. Kay, Jr., filed Dec. 22, 2004 (Kay PFR (of R&O)) at 5-10.

[141] 47 U.S.C. §§ 309(j), 332 and 257.

[142] *See* Guskey PFR (of R&O)) at 3-9; Preferred PFR (of R&O) at 33-46.

[143] *See* Coastal PFR (of R&O) at 17 n.36 *citing* 31 U.S.C. § 1341(a)(1)(B) (the Anti Deficiency Act) and 31 U.S.C. § 3302(b) (the Miscellaneous Receipts Act).

Nextel exceeded the Commission's statutory authority.[144] Coastal relies on *Motion Pictures Association of America Inc., v. FCC* (*MPAA*) for the proposition that "[t]he FCC cannot act in the 'public interest' if the [FCC] does not otherwise have the authority to promulgate the regulations at issue."[145] As discussed below, we find Coastal's argument unpersuasive.

62. We disagree with Coastal's assertion that the Commission relied exclusively on Sections 151 and 303 to modify Nextel's licenses to permit operations in the 1.9 GHz band. The Commission found that it had legal authority to implement 800 MHz band reconfiguration, including the authority to modify Nextel's licenses to permit operations in the 1.9 GHz band, under Sections 316,[146] 309(j),[147] 303,[148] 301,[149] and 151,[150] as well as 154(i)[151] of the Act.[152]

63. We find that *MPAA*, the precedent cited by Coastal relative to the Commission's jurisdiction, is inapposite here. In *MPAA*, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) specifically bounded the Commission's authority to deal with video description because Congress had only directed the Commission to produce a report on video description—"nothing more, nothing less."[153] Here, the Commission's authority "to resolve the interference problems that exist in the 800 MHz band" was not similarly limited. As noted in the *800 MHz R&O*, in the Auction Reform Act of

[144] *See* Coastal PFR (of R&O) at 12-14.

[145] *Id.* at 13-14 *citing Motion Picture Association of America v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (*MPAA*).

[146] 47 U.S.C. § 316(a)(1) (the Commission may modify a station license or construction permit "if in the judgment of the Commission such action will promote the public interest, convenience, and necessity, or the provisions of this [Act] ... will be more fully complied with.").

[147] 47 U.S.C. § 309(j) (requiring the Commission to award mutually exclusive applications for initial licenses or permits using competitive bidding procedures, except as otherwise provided).

[148] 47 U.S.C. § 303(f) (the Commission may "[m]ake such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: provided, however, that changes in the frequencies ..., shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with"); 47 U.S.C. § 303(r) (stating that "the Commission may...[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

[149] 47 U.S.C. § 301 ("No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio ... except under and in accordance with this Act and with a license in that behalf granted under the provisions of this [Act]").

[150] 47 U.S.C. § 151.

[151] 47 U.S.C. § 154(i) (stating that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions").

[152] *See 800 MHz R&O*, 19 FCC Rcd at 15010-11 ¶ 64.

[153] *See MPAA*, 309 F.3d at 807.

2002, Congress clearly indicated its approval of the Commission considering allocating spectrum outside the 800 MHz band in order to resolve the interference problems in the 800 MHz band.[154]

64. We reiterate that the Commission has the legal authority under the Communications Act to modify Nextel's licenses pursuant to Section 316 so long as it serves the public interest.[155] The starting point of the Commission's public interest analysis under Section 316 was Section 1 of the Act, which explicitly directs the Commission to promote safety of life and property through radio communications[156]—its exact objective in the instant proceeding. *California Mobile Metro Communications v. FCC (CMMC)*[157] and other cases demonstrate that Section 316 confers on the Commission broad discretion to modify licenses in the public interest.[158] Indeed, the D.C. Circuit has held that license modifications do not have to be entirely consensual;[159] that license holders may be moved on a service-wide basis, without license-by-license consideration;[160] and that eliminating harmful interference is an accepted basis for ordering such wholesale license modifications.[161]

65. Some parties contend that the license modifications that the Commission ordered to abate interference exceeded the license modification authority conferred on the Commission by Section 316 of the Act. James Kay argues that the Commission's Section 316 public interest finding was flawed because the Commission's goals could have been met otherwise, *i.e.*, that adequate interference abatement could be achieved by enforcement of the Commission's technical rules and reliance on market forces to cause Nextel to cease causing interference.[162] Kay also argues that a generic finding that Nextel's ESMR operations are causing interference does not justify modification of the licenses of non-ESMR licensees that have not caused interference to public safety.[163] Citing *CMMC*, he further asserts

[154] *See 800 MHz R&O*, 19 FCC Rcd at 15010 ¶ 63 *citing* the Auction Reform Act of 2002, Pub. L. No. 107-195, 116 Stat. 715, § 2(4) (2002) (*Auction Reform Act*). Congress observed that "[t]he Federal Communications Commission is also in the process of determining how to resolve the interference problems that exist in the 800 megahertz band, especially for public safety. One option being considered for the 800 megahertz band would involve the 700 megahertz band. The Commission should not hold the 700 megahertz auction before the 800 megahertz interference issues are resolved or a tenable plan has been conceived."

[155] *See 800 MHz R&O*, 19 FCC Rcd at 15011-12 ¶¶ 65-67.

[156] *See* 47 U.S.C. § 151; *see generally 800 MHz R&O*, 19 FCC Rcd at 15011 ¶ 64.

[157] *California Metro Mobile Communications v. FCC*, 365 F.3d 38, 45 (D.C. Cir 2004).

[158] *Id.*

[159] *See Peoples Broadcasting Co. v. United States*, 209 F.2d 286, 288 (D.C. Cir. 1953) (upholding the Commission's authority to modify a television station license without an application by the licensee for such a modification, noting that "if modification of licenses were entirely dependent upon the wishes of existing licensees, a large part of the regulatory power of the Commission would be nullified").

[160] *See Community Television, Inc. v. FCC*, 216 F.3d 1133, 1140 (D.C. Cir. 2000) (upholding the Commission's rules establishing procedures and a timetable under which television broadcasting would migrate from analog to digital technology).

[161] *See CMMC*, 365 F.3d at 41.

[162] *See* Kay PFR (of R&O) at 4-5.

[163] *Id.*

that the Commission may invoke Section 316 only to modify the licenses of stations that actually or potentially cause interference or to correct errors in frequency coordination.[164]

66. Neither Kay nor any other party has convinced us that band reconfiguration is not an essential solution for abating interference to public safety systems in the 800 MHz band. As the *800 MHz R&O* discusses in detail, unacceptable interference can result even when all contributors to that interference are operating in accordance with the rules.[165] Although Nextel has been implicated in interference incidents, the record reflects that the interference problem the Commission has sought to remedy in this proceeding is highly complex and has not been "caused" by any single party.[166] The cause is the fact that systems with incompatible technologies operate in spectral proximity to one another.[167] We continue to believe that the only feasible means to protect public safety licensees from unacceptable interference, now and in the future, is the spectral separation the Commission achieved in relocating public safety channels as far in frequency as possible from ESMR and cellular telephone operations.[168]

67. As noted in the *800 MHz R&O*, the holding in *CMMC* actually reinforces the Commission's legal authority to order band reconfiguration.[169] At issue in *CMMC* was whether the time limit established by Section 405 of the Act[170] precluded the Commission from modifying a license that had the potential to cause interference to an existing licensee. The *CMMC* court stated that the boundaries of Section 316 are not to be measured relative to the time limits of Section 405, but rather by the public interest standard of Section 316.[171] Although the action under review in *CMMC* related to a frequency coordination error, the court did not hold that the Commission's right to invoke Section 316 is limited to modifying licenses of stations that cause interference or correcting technical errors, as Kay argues. Instead, as noted above, the central holding of *CMMC* and other cases affirming the Commission's Section 316 authority is that the Commission has broad discretion in modifying licenses when doing so would serve the public interest.

b. Competitive Bidding Arguments

68. Preferred contends that modifying Nextel's license to afford it access to spectrum at 1.9 GHz is impermissible under *CMCC* because *CMMC* applies to license modifications, not to initial licensing scenarios. According to Preferred, assigning Nextel 1.9 GHz access to spectrum represents a modification that is so different in kind that it constitutes issuance of an initial license under the

[164] *Id.*

[165] *See 800 MHz R&O*, 19 FCC Rcd at 15034-37 ¶¶ 115-123.

[166] *See id.*, 19 FCC Rcd at 15113 ¶ 300.

[167] *See id.*

[168] *See id.*, 19 FCC Rcd at 15050-15052 ¶¶ 150-153.

[169] *See 800 MHz R&O*, 19 FCC Rcd at 15011 ¶ 65 n.214.

[170] 47 U.S.C. § 405.

[171] *See CMMC*, 365 F.3d at 45-46.

standards enunciated in *Fresno Mobile Radio,*[172] and by the Commission in the *Competitive Bidding Second R&O*[173] and as reflected in Section 1.929(a)(6)[174] of the Commission's Rules.[175]

69. We reaffirm our conclusion that the grant to Nextel of access to 1.9 GHz spectrum was well within the scope of the Commission's Section 316 license modification authority and past precedent, and that the Commission was not precluded from granting such rights by license modification as opposed to initial licensing.[176] Contrary to Preferred's contention, the *Fresno* case does not suggest that the Commission exceeded its license modification authority here. As an initial matter, *Fresno* did not even address the scope of the Commission's license modification authority under Section 316, but only the question of whether the Commission properly exercised its initial licensing authority under Section 309(j)(1) of the Communications Act. At issue in that case was a challenge to the Commission's creation and auction of new EA-based geographic overlay licenses in the 800 MHz band for geographic areas in which there were existing site-based SMR incumbents. Because the Commission was creating an entirely new service and licensing rules for the band, with EA licensees receiving significantly expanded spectrum rights and flexibility in comparison to existing site-based licensees, the Commission rejected attempts by some incumbents to obtain EA licenses by "modification" of their existing site-based licenses. The *Fresno* court found that declining to do so was a reasonable exercise of the Commission's initial licensing authority. The court found that in order for a license to be considered "initial" under Section 309(j)(1), "a newly issued license must differ in some significant way from the license it displaces."[177] The court noted that "nothing in the text of [section 309(j)] forecloses [the FCC] from considering a license 'initial' if it is the first awarded for a particular frequency under a new licensing scheme, that is, one involving a different set of rights and obligations for the licensee."[178] However, as the Commission stated in the *800 MHz R&O*, the authorizations that Nextel will hold as a result of the restructuring process do not differ significantly enough—in terms of rights and responsibilities—from

[172] *See Fresno Mobile Radio, Inc., et al. v. FCC*, 165 F.3d 965, 970 (D.C. Cir. 1999) (*Fresno*).

[173] Implementation of Section 309(j) of the Communications Act-Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348 (1994) (*Competitive Bidding Second R&O*).

[174] 47 C.F.R. § 1.929(a)(6).

[175] *See* Preferred PFR (of R&O) at 33-44. Preferred contends that the award of a nationwide license would be considered an initial license under the Commission's rules since it would be a "major modification." *Id.* at 36. Under the Commission's rules, Preferred argues, a licensee' request to add spectrum for which the applicant is not currently authorized is considered a major modification. *Id. citing* 47 C.F.R. § 1.929(a)(6) (application or amendment to application requesting new frequencies for which the applicant is not currently authorized should be classified as a major filing). According to Preferred, the Commission has long-recognized such a major modification as the equivalent of an initial license that is subject to the competitive bidding provisions of Section 309(j). Preferred' reliance on this rule is misplaced because the standard enunciated in the *Competitive Bidding Second Report & Order*, states that the Commission will consider the nature of the modification among other factors in determining whether a modification should be treated as an initial license. *See* ¶ 70 *infra*.

[176] *See 800 MHz R&O*, 19 FCC Rcd at 15015 ¶ 73, n.236.

[177] *See Fresno*, 165 F.3d at 970.

[178] *Id.*

Nextel's existing authorizations to warrant their being regarded as the issuance of a new license rather than a modification of license.[179]

70. Although the Commission had the authority to auction licenses, it was not required to do so, as Preferred argues. Section 309(j) supports our conclusion that we have the authority to avoid mutual exclusivity in this context when it is in the public interest to do so. The Commission, acting within the discretion afforded it by Section 309(j), declined to auction the 1.9 GHz spectrum and thus did not accept applications that would have been mutually exclusive with the modification of Nextel's license. The plain language of Section 309(j) does not require the Commission to subordinate its duty of promoting safety of life and property in order to generate auction revenues and promote competition. Section 309(j)(6)(E) provides that "[nothing in this subsection shall] be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings."[180] Thus, as the Commission stated in the *800 MHz R&O*, in Section 309(j)(6)(E), Congress recognized that the Commission can determine that its public interest obligation warrants action that avoids mutual exclusivity, and that this obligation extends to "applications and licensing proceedings" (which include license modifications), not just initial licensing matters.[181] As the Commission found in the *800 MHz R&O*, the conclusion that it has the authority to avoid mutual exclusivity in this context when it is in the public interest to do so is supported by the Act's legislative history,[182] subsequent court and Commission decisions,[183] and other provisions of the Act.[184]

71. The *800 MHz R&O* was faithful to Congress' directive that the Commission consider a variety of public interest objectives when "identifying classes of licenses and permits to be issued by competitive bidding, in specifying the eligibility and other characteristics of such licenses and permits, and in designing methodologies for use under this subsection."[185] The public interest objectives of Section 309(j)(3) apply broadly to the threshold issue of which licenses should be subject to auction. Thus, Section 309(j)(3) of the Act requires us to consider our Title I obligations, pursuant to Section 151 of the Act, which includes promoting safety of life and property through radio communications. In sum, Sections 151 and 303 of the Act and recent Congressional statements buttress the conclusion that assigning Nextel 1.9 GHz spectrum rights as part of the Commission's plan to solve interference is a valid use of spectrum in the public interest.[186]

72. Similarly, we reject Kay's argument that assigning spectrum to Nextel undermines the economic purpose of Section 309(j). His economic policy paper arguing that market based valuations are

[179] *See 800 MHz R&O*, 19 FCC Rcd at 15015 ¶ 73, n.236.

[180] 47 U.S.C. §309(j)(6)(E) (emphasis added).

[181] *See 800 MHz R&O*, 19 FCC Rcd at 15015 ¶ 73.

[182] *Id.* at 15015 n.237.

[183] *Id.*

[184] *Id.* at 15016 n.238.

[185] 47 U.S.C. § 309(j)(3).

[186] *See 800 MHz R&O*, 19 FCC Rcd at 15010 ¶ 63 *citing Auction Reform Act.*

superior to third-party appraisals in assessing the value of spectrum[187] does not alter our conclusion that assigning the 1.9 GHz spectrum to Nextel in this case is in the public interest. Section 309(j)(7) prohibits the Commission from basing a decision to auction spectrum solely on the expectation of auction revenues.[188] Although the recovery of auction revenue and promoting competition are important purposes of the auction statute,[189] Congress recognized that there may be more important uses for spectrum than generating revenues for the Treasury. We believe that in the instant case the public interest benefit of having reliable interference-free communications for the nation's first responders in paramount.

c. Regulatory Parity

73. We also find unpersuasive claims that considerations of regulatory parity codified in Section 332 of the Act[190] either require the Commission to open access to 1.9 GHz spectrum to non-Nextel EA licensees,[191] or prohibit assigning replacement spectrum exclusively to Nextel as compensation for its spectrum and monetary contributions to band reconfiguration.[192] By way of background, in 1993 Congress amended Section 332 of the Act to require the Commission to classify all mobile radio services as either "commercial" or "private."[193] For certain services classified as Commercial Mobile Radio Services (CMRS), the Commission was required to promulgate "technical requirements that are comparable to the technical requirements that apply to licensees that are providers of substantially similar [commercial] services."[194] The Commission subsequently concluded that SMR licensees offering for-profit interconnected services—*i.e.*, those involving both radio and landline telephone communications—are "substantially similar" to cellular telephone and Personal Communication Service (PCS) services and should therefore be subject to comparable regulatory regimes.[195] However, although achieving

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[187] *See Market-Based Valuation vs. Third Party Appraisals as a Means to Ensure Fair Valuation and Efficient Allocation of 1.9 GHz Spectrum*, Lee L. Selwyn and Helen E. Goldberg (Dec. 2004) attached to Kay PFR (of R&O).

[188] 47 C.F.R. § 309(j)(7).

[189] 47 C.F.R. § 309(j)(3).

[190] 47 U.S.C. § 332(c)(8).

[191] *See* Preferred PFR (of R&O) at 38, 40 *citing* Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 6002(d)(3)(B), 107 Stat. 397 (1993); Guskey PFR (of R&O) at 3-9.

[192] *See* Coastal PFR (of R&O) at 14-16.

[193] *See* 47 U.S.C. § 332(c).

[194] *See* Pub.L. No. 103-66, § 6002(d)(3)(B), 107 Stat. 312 (1993) (requiring the Commission to determine if a reclassified private land mobile service is "substantially similar" to a common carrier service and, if so, the extent to which it is "necessary and practical" to modify our rules to ensure that the two services are subject to "comparable" technical requirements).

[195] *See* Implementation of Sections 3(n) and 332 of the Communications Act, GN 92-235, *Third Report and Order*, 9 FCC Rcd 7988, 8001-8036, 8042 ¶¶ 22-79, 94 (1994). In this connection, we note the Commission previously classified SMR licensees who offer interconnected service as CMRS whereas SMR licensees who do not offer interconnected service were classified as PMRS. *See* Implementation of Sections 3(n) and 332 of the Communications Act, GN 92-235, *Second Report and Order*, 9 FCC Rcd 1411, 1510 ¶ 269 (1994).

regulatory parity is a significant policy goal that can yield important pro-competitive and pro-consumer benefits, the Commission has long recognized that parity for its own sake is not required by Section 332 or any other provision of the Act.[196] In fact, Congress recognized that differential regulatory treatment of CMRS providers is permissible,[197] because Section 332 explicitly authorizes the Commission to distinguish between CMRS providers,[198] and instructs us to look beyond the scope of economic competition when making spectrum management decisions, so that we may consider the effect of our actions on safety of life and property. Indeed, the Commission may not do otherwise: the D.C. Circuit has stated that "[t]he Commission is not at liberty to subordinate the public interest to the interest of 'equalizing competition among competitors.'"[199] Thus, because the Commission, in the *800 MHz R&O*, provided a reasoned explanation of why Nextel's unique role in solving the unacceptable interference problem justified differential treatment, it complied with Section 332 and the cases interpreting it.

74. We also disagree with Preferred's contention that precedent dictates that the Commission could only assign the 1.9 GHz spectrum outside the auction process if it made it available to all EA licensees.[200] In support of this claim, Preferred cites language in court cases to the effect that the Commission may not establish a license by rule, *i.e.*, that the Commission, merely by invoking its rulemaking authority, cannot avoid the adjudicatory procedures required for granting and modifying individual licenses.[201] However, the cases cited on this point by Preferred cannot reasonably be read to say that, in the case of modification of Nextel's licenses, the Commission was either obligated to auction the 1.9 GHz spectrum or, if not, to accept mutually exclusive applications for the spectrum.[202] For example, in *ARINC*, the D.C. Circuit overturned a Commission decision awarding a license to a consortium of qualified and interested parties rather than a single licensee.[203] The *ARINC* court found

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[196] *See* Year 2000 Biennial Regulatory Review -- Amendment of Part 22 of the Commission's Rules to Modify or Eliminate Outdated Rules Affecting the Cellular Radiotelephone Service and Other Commercial Mobile Radio Services, WT Docket No. 01-108, *Order on Reconsideration*, 19 FCC Rcd 3239 at 3248 ¶ 21 (2004).

[197] *See* H.R. Rep. No. 111, 103d Cong., 1st Sess., 1993, reprinted in 1993 U.S. Code Cong. & Admin. News 378, 586-89.

[198] *See* 47 U.S.C. 332(c)(1)(A) ("A person engaged in the provision of a service that is commercial mobile radio service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this chapter, except for such provisions of subchapter II of this chapter as the Commission may specify by regulation as inapplicable to that service or person.").

[199] *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1491 (D.C. Cir. 1995). *See Hawaiian Telephone Co. v. FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974) (FCC did not conform to public interest mandate in approving applications where it considered the factor of "competition not in terms primarily as to benefit the public but specifically with the objective of equalizing competition among competitors"). *See also W.U. Telephone Co. v. FCC*, 665 F.2d 1112, 1122 (". . . equalization of competition is not itself a sufficient basis for Commission action").

[200] *See* Preferred PFR (of R&O) at 37.

[201] *See* Preferred PFR (of R&O) at 38 *citing Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 451 (D.C. Cir. 1991)(*ARINC*); *Committee for Effective Cellular Rules v. FCC*, 53 F.3d 1309, 1313 (D.C. Cir. 1995); *New South Media Corp. v. FCC*, 685 F.2d 708 (D.C. Cir. 1982).

[202] *See* Preferred PFR (of R&O) at 37-38.

[203] *See ARINC*, 928 F.3d at 428.

only that the Commission's rule making authority did not extend to requiring interested applicants (which had not filed their applications as a consortium) to join a consortium and forego the opportunity to obtain individual licenses.[204] The narrow holding in ARINC is inapposite here, because, pursuant to Section 309(j) of the Act, the Commission did not—and was not required to—open the 1.9 GHz spectrum to mutually exclusive applicants, much less require such applicants to establish a consortium to serve as the licensee.[205]

d. Market Entry Barriers

75. We similarly disagree with arguments that Section 257 of the Act requires the Commission to provide spectrum rights in the 1.9 GHz band to non-Nextel EA licensees.[206] Section 257 requires the Commission to conduct a proceeding to identify and eliminate "market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services" within fifteen months of the enactment of the Telecommunications Act of 1996, and periodically to review its regulations and report to Congress regarding the existence of any such barriers.[207] The Commission concluded the requisite initial proceeding in 1997[208] and has since issued three Section 257 Reports to Congress, the most recent in 2004.[209] A Section 257 review does not negate the Commission's Title I mandate to promote safety of life and property through radio communications. Thus, we are not persuaded that our obligation to report to Congress and to review our regulations concerning market barriers translates to the conclusion, urged by petitioners, that we are foreclosed from providing the nation's first responders with reliable 800 MHz communications systems on account of what they apparently perceive as a barrier against their entry into the telecommunications marketplace.

e. Appropriations Statutes

76. Finally, we disagree with Coastal's contention that the *800 MHz R&O* failed to adequately address concerns that the assignment of 1.9 GHz spectrum to Nextel violates the Anti-Deficiency Act (ADA) or the Miscellaneous Receipts Act (MRA).[210] The *800 MHz R&O* fully addressed the ADA, the MRA and other other legal issues raised by various commenting parties, and concluded that these statutes did not limit the Commission's authority to reallocate spectrum or to require a licensee to pay others' relocation costs in the manner provided in the *800 MHz R&O*.[211] However, aware that a member of Congress had asked the Government Accountability Office (GAO) to render an opinion on the applicability of those statutes, the Commission committed to revisit the matter should the Comptroller

[204] *See id.*, 928 F.3d at 451-53.

[205] *See 800 MHz R&O*, 19 FCC Rcd at 15013 ¶ 69.

[206] *See* Preferred PFR (of R&O) at 39.

[207] *See* 47 U.S.C. § 257(a).

[208] *See* Section 257 Proceeding To Identify and Eliminate Market Entry Barriers For Small Businesses, *Report*, GN Docket No. 96-113, 12 FCC Rcd 16802 (1997).

[209] *See* Section 257 Triennial Report to Congress, *Report*, 19 FCC Rcd 3034 (2004).

[210] *See* Coastal PFR (of R&O) at 17 n.36.

[211] *Id.* at 15020-21 ¶¶ 85-87.

General, the head of the GAO, unambiguously conclude that the Commission's actions violated either the ADA or the MRA.[212] Subsequently, the GAO analyzed the *800 MHz R&O* and the Comptroller General rendered an opinion consistent with the Commission's analysis. The GAO found that providing Nextel spectrum rights in exchange for its spectral and financial contributions to band reconfiguration does not violate the ADA, because the *800 MHz R&O* does not involve FCC "obligations" or "expenditures" under the ADA.[213] Similarly, with regard to the MRA, the GAO found that modification of Nextel's licenses results in no money owed the government, and it deferred to the Commission's interpretation of the Commission's authority to assign Nextel spectrum pursuant to a license modification.[214] Coastal has failed to address the GAO decision or present any new argument that would suggest a violation of these appropriations statutes. Accordingly we reaffirm the Commission's sound conclusion that the *800 MHz R&O* did not violate the ADA and MRA.

2. Valuation

77. In the *800 MHz R&O*, the Commission estimated that a fair market value of the 1.9 GHz band replacement spectrum rights was $1.70 per MHz per person (MHz-pop) or approximately $4.86 billion,[215] which it based, in part, on two benchmark secondary market transactions: a December 2002 purchase by Verizon Wireless of fifty Northcoast licenses and a Fall 2003 agreement by Cingular Wireless to purchase NextWave spectrum in thirty-four cities.[216] One petitioner contends that we must revalue the 1.9 GHz spectrum based on Verizon Wireless's July 8, 2004 purchase of ten megahertz of PCS spectrum in New York for $930 million instead of the Verizon/Northcoast transaction in which Verizon paid only $481 million to purchase a ten megahertz New York license.[217] This substitution, it is argued, would raise the fair market value of the 1.9 GHz band spectrum rights to $2.19 MHz-pop.[218]

78. We decline to reconsider the valuation performed in the *800 MHz R&O*. As an initial matter, we note that the valuation method used by the Commission is not in dispute, but rather whether we should revalue the 1.9 GHz band spectrum rights based on a more recent transaction. The Commission performed the valuation in the *800 MHz R&O* using the most recent arms-length transactions involving the purchase of large numbers of spectrum licenses.[219] The Commission found that these transactions most accurately reflected the value of a nationwide license because they involved a large number of

[212] *See id.* at 15021 ¶ 86.

[213] *See* Letter, dated Nov 8, 2004, from Anthony Gamboa, General Counsel, General Accounting Office to the Honorable Frank R. Lautenberg, U.S. Senate (*GAO Letter*). The ADA, 31 U.S.C. § 1341(a)(1)(B), prohibits federal agencies from obligating or expending funds in excess or in advance of the amount Congress has appropriated. *Id* at 9-10.

[214] *GAO Letter* at 18-22. The MRA, 31 § U.S.C. 3302(b), requires that money received for the United States be deposited in the Treasury and an agency cannot avoid the statute by changing the form of its transaction to avoid receiving money that would otherwise be owed to it unless so authorized by law.

[215] *See 800 MHz R&O*, 19 FCC Rcd at 15112 ¶ 297.

[216] *Id.*, 19 FCC Rcd at 15111 ¶ 293.

[217] *Guskey PFR (of R&O)* at 4-5.

[218] *Id.*

[219] *See 800 MHz R&O*, 19 FCC Rcd at 15111 ¶ 294.

licenses spanning a representative range of small to large markets and no assets other than the licenses themselves were involved.[220]

79. The Commission recognized that the spectrum value could change after the order was adopted but emphasized that the value of spectrum is seldom static because it hinges on multiple variables, some intangible, which exist at the moment a willing buyer and willing seller agree to a transaction or when an informed bidder places its bid in an auction.[221] Thus, the estimate performed by the Commission was a "snapshot" based on the best available data at that time. Although the Verizon transaction occurred on July 8, 2004, the day the *800 MHz R&O* was adopted, it would have been impossible for the Commission to factor this transaction into its valuation without further delay of the order. We see no reason to revisit the valuation based on the Verizon or any subsequent transaction. We believe that continuing to alter our valuation based on the latest transactions would create continuing uncertainty, undermine the band reconfiguration process, and violate the cardinal regulatory principal of administrative finality.

3. Effect of the Proposed Sprint/Nextel Merger

80. On December 14, 2004, Sprint Corporation (Sprint) and Nextel announced their intention to merge into a single company, to be called Sprint Nextel.[222] On February 8, 2005, Sprint and Nextel filed joint applications requesting that the Commission approve the transfer of control of licenses and authorizations currently held or controlled, directly or indirectly, by Nextel in connection with their proposed merger.[223] In their merger application, Sprint and Nextel agree to accept the obligations placed on Nextel in the *800 MHz R&O*.[224] We approved the merger on August 3, 2005.[225]

81. Some petitioners claim that we should reevaluate our actions in this proceeding in light of the proposed merger.[226] For example, Duncan contends that the Commission would presumably require the

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[220] *See id.*

[221] *See id.*, 19 FCC Rcd at 15107 ¶ 283.

[222] *See* Joint Press Release of Sprint and Nextel, dated Dec. 15, 2004 "Sprint and Nextel to Combine in Merger of Equals" available at http://sprintnextel.mergerannouncement.com/?refurl=uhp_globalnav_merger (Merger Press Release).

[223] *See* Applications for the Transfer of Control of Licenses and Authorizations from Nextel Communications, Inc. and its Subsidiaries to Sprint Corporation, WT Docket 05-63, *Order*, DA 05-423, 20 FCC Rcd 3607 (WTB 2005).

[224] *See* File No. 0002031766, Application, WT Docket No. 05-63 at 62-63. *See also* Nextel Opposition to PFR at 21. In this connection, we reject the argument that we should refrain from assigning Nextel 1.9 GHz spectrum until completion of band reconfiguration. *See* Guskey PFR (of R&O) at 4. Such a request is unnecessary given that the R&O imposes several conditions on Nextel's 1.9 GHz licenses, including the requirement to complete band reconfiguration.

[225] *See* Applications of Nextel Communications, Inc. and Sprint Corporation For Consent to Transfer Control of Licenses and Authorizations, *Memorandum Opinion and Order*, FCC 05-148 (rel. Aug. 8, 2005).

[226] *See* Petition for Reconsideration of Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, filed Dec. 22, 2004 by Richard W. Duncan d/b/a Anderson Communications (Duncan PFR (of R&O)) at 5; Reply to Opposition and Comments of Nextel Ommunicaions[sic], Inc. Regarding Petitions for Reconsideration filed Apr. 28, 2005 by Richard W. Duncan d/b/a Anderson Communications (Duncan (continued....)

proposed merged entity to divest itself of 1.9 GHz spectrum given the spectral overlaps between Sprint's holdings and 1.9 GHz spectrum to be licensed to Nextel.[227] Our approval of the merger renders Duncan's request to stall the band reconfiguration process pending a Commission ruling on the Nextel Sprint merger moot.

82. Duncan also claims that the Nextel Sprint merger obviates the need for Nextel to use 1.9 GHz to develop a next generation network, and therefore the valuation of spectrum surrendered by Nextel fails to take into account what Duncan describes as $3 billion in cost-savings if it "flips" the 1.9 GHz spectrum at a profit.[228] Again, Duncan relies solely on speculation about Nextel's business plans and offers no support for the supposition that Nextel will not use 1.9 GHz spectrum to develop a next-generation network. His claim that Nextel would realize a cost savings as a consequence of the merger is similarly speculative and unsupported. Although there is no assurance that a merged Nextel Sprint entity would be successful, the combination of the two licensees' financial resources suggests that the merged entity would be better equipped to bear the cost of band reconfiguration. Accordingly, we decline to revisit the fair market value of the 1.9 GHz spectrum based on any alleged "cost savings" Nextel will receive as a consequence of the merger. As noted in paragraph 79 *supra,* considerations of administrative finality preclude our re-evaluating our estimates every time there is a financial event in the wireless industry that could bear on the value of the 1.9 GHz spectrum.[229] We also reject, as speculative and unsupported, Duncan's claim that the Commission intended to solve the interference problems in the 800 MHz band by having Nextel migrate its current network to the 1.9 GHz band. Neither the *800 MHz R&O* nor the *Supplemental Order* reflect such an intention.

83. Finally, we reject Guskey's argument that we should refrain from assigning Nextel 1.9 GHz spectrum until completion of band reconfiguration.[230] We believe that the *800 MHz R&O* imposes sufficient conditions on the 1.9 GHz license to ensure that Nextel will perform its band reconfiguration obligations.[231]

J. 800 MHz Spectrum Rights Valuation

84. As one component of its "value for value" analysis, the Commission estimated the market value of the 800 MHz spectrum rights that Nextel would relinquish as a result of band reconfiguration.[232] Parties ask us to reconsider this valuation, arguing that the Commission overvalued Nextel's General

(Continued from previous page)
Reply) at 3-4. *See also* Reply to Oppositions to Petitions for Reconsideration, filed May 2, 2005, by Preferred Communication Systems, Inc. (Preferred Reply) at 3-4.

[227] *See* Duncan PFR (of R&O) at 5-6. As noted below, we herein resolve some of the issues raised in the petition for reconsideration filed by Richard W. Duncan d/b/a Anderson Communications. We subsequently will address any remaining issues raised in that petition.

[228] *See* Duncan PFR (of R&O) at 6-7; Duncan Reply at 4-5. Duncan only cites "a recent report in the Wall Street Journal" as the basis for his argument.

[229] *See also* ¶ 79, *supra; 800 MHz R&O,* 19 FCC Rcd at 15105-25 ¶¶ 279-332.

[230] *See* Guskey PFR (of R&O) at 4.

[231] *See 800 MHz R&O,* 19 FCC Rcd at 15081-82 ¶ 214.

[232] *See id.,* 19 FCC Rcd at 15117-21 ¶¶ 314-323.

Category spectrum rights, and should not have credited Nextel for restricting its use of the 800 MHz band at the ESMR band edge and Nextel's costs for new filters for Nextel cells operating there.[233]

1. General Category Spectrum Rights

85. The Commission established a baseline value of $1.70 per MHz-pop for contiguous spectrum in the 800 MHz band and applied this value to Nextel's General Category spectrum.[234] It discounted Nextel's interleaved spectrum by 12.5 percent because Nextel would likely experience reduced capacity while operating on interleaved spectrum.[235] The reduced capacity stems from the fact that, on interleaved channels, Nextel must limit its operations to avoid causing out-of-band emission (OOBE) interference to adjacent channel licensees.[236]

86. Some parties claim that the Commission, in addition to applying a discount for channels in the interleaved portion of the band, should have applied a similar discount to Nextel's current General Category spectrum rights.[237] We reject these claims because they fail to recognize that there are far fewer site-based incumbents in the General Category than in the interleaved channels, and hence fewer licensees subject to potential interference. Moreover, the Commission specifically accounted for these site-based incumbents when it accepted Nextel's granular data on usable channels in the General Category.[238]

2. Credit for Operational Restrictions at the Edge of ESMR Portion of the Band

87. In the *800 MHz R&O*, the Commission granted Nextel a credit for the operational restrictions that Nextel would encounter at the bottom edge of its contiguous 800 MHz ESMR spectrum in the 817-824 MHz/862-869 MHz band segment because of the need to limit out-of-band emissions (OOBE). The Commission concluded that these restrictions would effectively limit Nextel's use of half a megahertz of its ESMR spectrum after rebanding.[239] We disagree with the contention that this credit was inappropriate because Nextel already had been given credit for relinquishing its Guard Band and Expansion Band spectrum below 817/862 MHz.[240] This argument fails to take into account that there will be stations operating in the Guard Band and Expansion Band, and that Nextel must afford them interference

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[233] *See* Guskey PFR (of R&O) at 7-8. We disagree with Guskey's assertion that the Commission should not have given Nextel credit for spectrum that Nextel Partners will relinquish. *Id.* at 9-10. Nextel Partners and Nextel jointly agreed that this is how the Commission should apportion that credit. *See* Comments of Nextel Communications, Inc., and Nextel Partners Inc., filed Dec. 2, 2004 at 9-10. We decline to overturn that agreement.

[234] *See 800 MHz R&O*, 19 FCC Rcd at 15117 ¶ 315.

[235] *See id.*, 19 FCC Rcd at 15118-19 ¶ 318.

[236] *See id.*

[237] *See, e.g.*, Guskey PFR (of R&O) at 7.

[238] *See Supplemental Order*, 19 FCC Rcd 25134-35 ¶ 31 n.69.

[239] *Id.*, 19 FCC Rcd at 15118 ¶ 316.

[240] Guskey PFR (of R&O) at 8.

protection, albeit on a sliding scale starting below the upper portion of the Guard Band.[241] To achieve this protection, Nextel must avoid the use of certain channels in the lower portion of the ESMR band, or provide filtering equipment for cells operating there. We therefore conclude that the Commission properly took these factors into account when it performed its valuation calculation.

3. Credit for Installing Filters

88. Guskey argues that by crediting Nextel for the cost of filters Nextel will install to protect non-cellular systems operating below 817 MHz/862 MHz, the Commission inappropriately gave Nextel credit for costs it would in in any event to comply with Commission regulations.[242] As the Commission noted in the *800 MHz R&O,* Nextel must extensively modify its systems to accommodate band reconfiguration.[243] When the Commission directed Nextel to confine its ESMR operations to frequencies above 817/862 MHz, it recognized that, at the ESMR/non-ESMR intersection, Nextel would have to install additional filtering at its cell sites if it was to avoid interference to stations in the Guard Band, immediately below.[244] Assuming, *arguendo*, that the expenses that Nextel must incur relate to compliance with the Commission's rules, they are actual expenses, nonetheless, that Nextel is incurring as a direct consequence of band reconfiguration. Accordingly, the Commission properly factored the cost of such filtering equipment into its value-for-value analysis. We therefore deny this element of Guskey's petition.

K. EA and Site-Based Vacated Spectrum

89. Pursuant to the *800 MHz R&O*, Nextel will relinquish all of its 800 MHz spectrum holdings below 817/862 MHz as part of band reconfiguration.[245] Pursuant to the *Supplemental Order* and the decisions we take in the instant *MO&O,* other EA licensees may also relocate their EA and, in some instances, site-based holdings from the lower portion of the 800 MHz band into the ESMR band segment.[246] Should any of the vacated spectrum (EA or site-based) consist of public safety pool channels, those channels will remain in the public safety pool and only eligible public safety entities may apply for them. Non-public safety pool vacated spectrum (EA or site-based) will be available for three years only to public safety eligibles, and in the following two years, only public safety and CII eligibles may apply for such channels.[247] The three-year and two-year (cumulatively five-year) periods must be measured from the date that band reconfiguration is completed in a given NPSPAC region.[248] In

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[241] *See 800 MHz R&O,* 19 FCC Rcd at 15054-55 ¶ 158.

[242] *See* Guskey PFR (of R&O) at 8; *800 MHz R&O,* 19 FCC Rcd at 15113-14 ¶¶ 301-302.

[243] *See 800 MHz R&O,* 19 FCC Rcd at 15113-14 ¶¶ 301-302.

[244] *Id.*

[245] *See 800 MHz R&O*, 19 FCC Rcd at 14977 ¶ 11.

[246] *See generally* ¶¶ 10-28 *supra.*

[247] *See* 47 C.F.R. § 90.617(g) (as amended in Appendix B *infra*). Limited eligibility will also apply to channels vacated by licensees choosing to relocate to the Guard Band. *See* 47 C.F.R. § 90.617(h) (as amended in Appendix B *infra*).

[248] *See 800 MHz R&O*, 19 FCC Rcd at 15052 ¶ 152; 47 C.F.R. §§ 90.615, 90.617(g). While the Commission originally restricted eligibility to this vacated spectrum relative to the effective date of the *800 MHz* (continued....)

response to the requests of several parties,[249] we note that the construction requirements of Section 90.155 of our rules continue to apply to these channels, including those pertaining to the ability of public safety licensees to seek extended implementation pursuant to section 90.629 of our rules.[250]

90. Because of the limitations on public safety entities operating in the Guard Band and the Expansion Band, the foregoing eligibility restriction applies only to vacated spectrum below the Expansion Band.[251] Vacated spectrum in the Expansion Band or Guard Band will be open to any entity eligible for licensing on these channels. For instance, a B/ILT channel in the Expansion Band which is vacated by a relocating EA licensee will be available after band reconfiguration for licensing to any B/ILT eligible.[252]

91. We appreciate the concern raised by the American Electric Power Company that public safety or CII licensees could acquire channels pursuant to the restricted eligibility provisions discussed above and then "flip" the licenses to entities that otherwise would be ineligible, *e.g.*, transferees seeking to use the channels for CMRS.[253] Such conduct would be inconsistent with Commission's intention in this proceeding. While we decline to take a specific action here—such as requiring a holding period— we will monitor developments and stand ready to take action in the future if the public safety/CII access provision is abused.

92. In the *Supplemental Order*, the Commission noted that it will issue a public notice specifying when entities may begin filing for vacated spectrum in a given NPSPAC region.[254] We will issue such a public notice when reconfiguration is complete in a given NPSPAC region.[255] The release date of the public notice will serve as the start date for the limited five-year eligibility clock, (*i.e.*, three years for public safety and the following two years for public safety and CII). We delegate to the Chief of the Wireless Bureau the authority to issue such public notices.

(Continued from previous page)
R&O, it subsequently modified this date to ensure that all public safety and CII licensees enjoy the same temporal amount of exclusive access to ESMR-vacated spectrum following the conclusion of band reconfiguration in a NPSPAC region. See *Supplemental Order*, 19 FCC Rcd at 25145 ¶58.

[249] *See* Petition for Clarification of American Electric Power Company, Inc., filed Dec. 21, 2004 (AEP PFR (of R&O)) at 6; Opposition to Petition for Clarification of American Electric Power Company, Inc., filed by the Association of Public-Safety Communications Officials-International, Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, International Municipal Signal Association, Inc., Major Cities Chiefs Association, Major County Sheriffs' Association, and National Sheriffs' Association, filed Apr. 21, 2005 (*APCO Opposition*) at 2.

[250] Extended implementation refers to the ability of licensees to request a period of up to five years to place their systems in operation. *See* 47 C.F.R. § 90.629.

[251] *See* 47 C.F.R. §§ 90.617(g), (h).

[252] *Cf.* 47 C.F.R. § 90.615.

[253] *See* AEP PFR (of R&O) at 6.

[254] *See Supplemental Order*, 19 FCC Rcd 25145 ¶ 58.

[255] The determination of whether or not band reconfiguration will be deemed substantially complete is highly fact-dependent and will be determined at the Commission's discretion at the time the *Public Notice* is issued.

93. *Exelon seeks reconsideration of the Commission's decision not to afford CII entities the* same priority for obtaining EA Incumbent-vacated spectrum as public safety entities.[256] We decline to do so because the Commission has repeatedly stressed that one of the paramount goals of this proceeding is to provide additional 800 MHz spectrum that can be quickly accessed by public safety agencies and rapidly integrated into their existing systems.[257] As noted in paragraph 45, *supra,* the communications of public safety entities and CII entities are readily distinguishable, *i.e.,* the communications of CII licensees relate primarily to their core businesses and only occasionally matters affecting public safety, whereas public safety licensees have, as their central purpose, the use of radio communications to protect life and property.[258] Therefore, we deny Exelon's petition.

94. We also decline to require public safety agencies applying for EA incumbent-vacated spectrum to abide by a frequency plan derived by an 800 MHz Regional Planning Committee (RPC).[259] We have not been shown that the benefit of such a plan would be commensurate with the cost, complexity, and delay that implementing it would be likely to entail. We note that the Commission assigned the TA the responsibility of choosing channel assignments for relocating licensees and we expect the TA to do so in an efficient manner. We also note that the Commission developed RPCs specifically to administer the NPSPAC frequencies, which consisted of large blocks of vacant spectrum. The RPC construct would be of questionable value if applied to EA-vacated channels scattered throughout spectrum occupied by existing B/ILT, public safety and conventional SMR systems.

L. Application Freeze

95. In the *800 MHz R&O,* the Commission stated that it would freeze the processing of applications on a NPSPAC region-by-NPSPAC region basis and that the freeze would correspond to the relocation negotiation schedule.[260] Subsequently, the TA provided a proposed two-part relocation schedule that contemplated two separate negotiation periods in each NPSPAC region. The first negotiation period applied to licensees outside the original NPSPAC band segment, and the second schedule applied to licensees currently located within the original NPSPAC band segment. The Bureau concurred in the TA's recommendations.[261] In a subsequent *Public Notice*, the Bureau explained that under the two-part negotiation schedule, each NPSPAC region would undergo two freeze periods, one affecting licensees operating outside the original NPSPAC band segment and the second affecting

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[256] *See* Petition for Reconsideration, filed Dec. 22, 2004, by Exelon Corporation (Exelon PFR (of R&O)) at 5.

[257] *See 800 MHz R&O*, 19 FCC Rcd at 14973 ¶ 2.

[258] *See* 47 U.S.C. §337(f) (definition of public safety services).

[259] *See* APCO Opposition at 2-3.

[260] *800 MHz R&O*, 19 FCC Rcd at 15078 ¶ 204.

[261] *See* Wireless Telecommunications Bureau Approves the Basic Reconfiguration Schedule put Forth in the Transition Administrator's 800 MHz Regional Prioritization Plan, WT Docket No. 02-55, *Public Notice*, DA 05-619, 70 Fed. Reg. 21786 (2005). The Reconfiguration Schedule filed by the TA is available on the Commission's 800 MHz band reconfiguration web page at http://www.800MHz.gov. *See also* Wireless Telecommunications Bureau Announces That 800 MHz Band Reconfiguration Will Commence June 27, 2005, in the NPSPAC Regions Assigned to Wave 1 and Specifies 800 MHz Reconfiguration Benchmark Compliance Dates, *Public Notice,* DA 05-1546, rel. May 27, 2005 (*Starter PN*).

licensees within the original NPSPAC band segment.[262] The Bureau stated that the two-freeze approach would make band reconfiguration more efficient, and minimize any adverse effect that a longer-term single freeze period would have on incumbent licensees and new applicants.[263]

96. In a joint petition for reconsideration filed by a group of public safety organizations, we are requested to further clarify the provision in the *Freeze Clarification PN* concerning which stations must be "frozen."[264] Specifically, petitioners maintain that it is unnecessary to include public safety channels in the interleaved portion of the band (*i.e.*, 809.75-815/854.75-860 MHz) in the freeze, and therefore request that such stations be entirely exempted from the application freeze.[265]

97. We acknowledge that most of the applications for license modification to be filed by public safety licensees will be for channels in the new NPSPAC band segment at 806-809/851-854 MHz. However, there will also be instances where public safety entities (*e.g.*, public safety systems currently located in the Guard Band and the Expansion Band) will be relocated into channels in the 809-815/854-860 MHz portion of the band.[266] In order for the TA to determine the channels to which these systems are to be relocated, the TA must have a stable spectrum environment in which licensees are not allowed to change channels or expand their coverage. Otherwise, for example, if the TA were to select channel "X" for a relocating licensee, mutually exclusive applications could be filed and granted while the relocating licensee is evaluating the suitability of channel X as part of the negotiation process, which then would have to be re-started once the TA selected a new channel. This scenario could be replicated multiple times, particularly in large and heavily populated NPSPAC regions where usable channels are at a premium. The resultant delay and expense would be inconsistent with the Commission's express goal in this proceeding that band reconfiguration be completed within a thirty-six-month timeframe. Accordingly, we deny the petition for reconsideration. We remain, however, keenly aware of the vital role public safety communications plays in the protection of life and property and are committed to minimize any disruption the freeze could cause to this critical resource. Thus, we will expedite an evaluation of requests for waiver of the freeze filed by public safety entities.

98. We also take this opportunity to restate that we will not accept license modification applications that request more channels than are necessary to effect a given licensee's relocation.[267] We

[262] *See* Wireless Telecommunications Bureau Outlines Applications Freeze Process For Implementation of 800 MHz Band Reconfiguration, *Public Notice*, DA 05-1340 (WTB May 11, 2005) (*Freeze Clarification PN*).

[263] *Id.* at 2.

[264] *See* Petition for Clarification or Partial Reconsideration of Freeze Process for Implementation of 800 MHz Band Reconfiguration, filed by Association of Public-Safety Communications Officials-International-Inc., International Association of Chiefs of Police, International Association of Fire Chiefs, International Municipal Signal Association, Inc., Major Cities Chiefs Association, Major County Sheriff's Association and National Sheriff's Association (Public Safety Organizations Petition) at 2-3 (May 16, 2005).

[265] *Id.* As noted above, the decision to freeze channels was adopted in the *800 MHz R&O*. See *800 MHz R&O*, 19 FCC Rcd at 15078 ¶ 204. Thus, any request to eliminate certain channels from the freeze should have been filed as a petition for reconsideration of the *800 MHz R&O*. Nevertheless, we will address this issue herein.

[266] Although most such relocations will be to channels vacated by ESMR licensees, there is no certainty that there will be an adequate number of such channels to accommodate all public safety relocations.

[267] *800 MHz R&O*, 19 FCC Rcd at 15078 ¶ 204.

also will not accept modification applications that propose to expand the coverage area of an existing system. This includes, for example, modification applications that seek to correct the operating parameters of existing stations, such as effective radiated power, antenna elevation or geographical coordinates, when to do so would expand the licensee's currently authorized coverage contours. In short, modification applications are limited to adding the new agreed-upon frequencies (*i.e.*, frequencies consistent with the TA plan) or deleting the "old" frequencies. Thus, licensees are strongly cautioned to carefully verify the accuracy of their current authorizations and file any corrective applications prior to the time the band is "frozen" in their NPSPAC regions or after the freeze is lifted.[268]

M. Cost Reporting and Accounting Issues

99. Pursuant to the *800 MHz R&O*, the TA is required to file quarterly progress reports with the Commission in addition to an annual report to be filed on each anniversary of the effective date of the *800 MHz R&O*. The TA proposes a modification of the schedule to coordinate the reporting process with Securities and Exchange Commission (SEC) financial reporting regulations, applicable to Nextel, that forbid public disclosure of material financial information before Nextel's quarterly and annual submissions are made to the SEC.[269] The TA proposes that it file its quarterly and annual reports, which contain material financial information concerning Nextel, with the Commission on the first business day following Nextel's anticipated quarterly and annual filings with the SEC.[270] We believe that the TA's request is reasonable, and amend section 90.676 of our rules accordingly.[271]

N. BAS/MSS Issues

1. NAB/MSTV/SBE and Nextel Petitions for Reconsideration and Nextel/MSTV/NAB Request for Declaratory Ruling

100. The *800 MHz R&O* granted Nextel the use of spectrum at 1.9 GHz and established provisions for Nextel's clearing the 1990-2025 MHz band segment of Broadcast Auxiliary Service (BAS) incumbents.[272] Specifically, Nextel's licenses are conditioned on Nextel following a relocation

[268] *See Supplemental Order*, 19 FCC Rcd at 25148 ¶ 65. Applications to correct errors in data in the Commission's licensing database may be filed after reconfiguration has been completed in the relevant NPSPAC region.

[269] *See* Motion of 800 MHz Transition Administrator, LLC to Revise the Annual Progress Reporting Schedule, filed June 17, 2005.

[270] *Id.*

[271] *See* 47 C.F.R. § 90.676 (as amended in Appendix B *infra*).

[272] *See 800 MHz R&O*, 19 FCC Rcd at 15095-15100 ¶¶ 251-263. BAS includes mobile TV pickup (TVPU) stations—land mobile stations used for the transmission of TV program material and related communications, including electronic newsgathering (ENG) operations, from scenes of events back to the TV station or studio—and fixed BAS operations such as studio-to-transmitter link (STL) stations, TV relay stations, and TV translator relay stations. The majority of these fixed operations are in higher frequency bands allocated to the BAS. *See* 47 C.F.R. §§ 74.601(a),(b)(listing classes of TV broadcast auxiliary stations). *See generally* 47 C.F.R. §74 (Eligibility for license). In addition, BAS spectrum in the 2 GHz band is authorized for use by the Cable Television Relay Service (CARS) and the Local Television Transmission Service (LTTS). *See* 47 C.F.R. §§ 74.602, 78.18(a)(6) and § 101.801. For convenience, we refer to these services herein under the collective term "BAS." Thus, decisions herein that refer to BAS also apply to CARS and LTTS operations in the band. The (continued....)

procedure based on a plan submitted to the Commission by Nextel, the Association for Maximum Service Television (MSTV), and the National Association of Broadcasters (NAB).[273]

101. Prior to the effective date of the *800 MHz R&O* rules, the Commission had established a plan by which 2 GHz Mobile Satellite Service (MSS) licensees would relocate incumbent BAS operations in the entire 1990-2025 MHz band.[274] However, in the *800 MHz R&O*, the Commission found that the best way to ensure the continuity of BAS, a critical part of the broadcasting system by which emergency information and entertainment content is provided to the American public, during the transition was to retain the existing MSS relocation rules but also to overlay procedures by which Nextel may relocate BAS incumbents.[275] Therefore, Nextel is also obligated to clear the entire 1990-2025 MHz band of incumbent BAS operations.[276] The plan adopted by the Commission calls for Nextel's relocation of all BAS licensees from the 1990-2025 MHz band to comparable facilities within thirty months after the effective date of the *800 MHz R&O*.[277] The Commission directed Nextel to clear the 1990-2025 MHz band in two stages: during stage one, Nextel will relocate all BAS incumbents in markets where Nextel elects to deploy 1.9 GHz service immediately, and in any adjacent markets that raise BAS inter-market

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original 2 GHz BAS channel plan, which is still in use, is as follows: Channel 1 (1990-2008 MHz), Channel 2 (2008-2025 MHz), Channel 3 (2025-2042 MHz), Channel 4 (2042-2059 MHz), Channel 5 (2059-2076 MHz), Channel 6 (2076-2093 MHz), and Channel 7 (2093-2110 MHz).

[273] *See 800 MHz R&O,* 19 FCC Rcd at 15131-32 ¶ 353.

[274] *See* Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for use by the Mobile-Satellite Service, ET Docket No. 95-18, *Second Report and Order and Second Memorandum Opinion and Order*, 15 FCC Rcd 12315, 12365-66 ¶ 24 (2000) (*MSS Second R&O*). In 2003, the Commission reallocated fifteen megahertz of spectrum from MSS in the 1990-2025 MHz band to support new fixed and mobile services—ten megahertz in the 1990-2000 MHz band and five megahertz in the 2020-2025 MHz band. *See* Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems, ET Docket No. 00-258, *Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, 18 FCC Rcd 2223, 2231-32 ¶15 (2003) (*AWS Third R&O, Third NPRM, and Second MO&O*). Given the need to provide for the rapid introduction of advanced wireless services (AWS) in the 2 GHz BAS band, the Commission modified the plan that 2 GHz MSS licensees were to follow when relocating incumbent BAS licensees in the 1990-2025 MHz band. *See* Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, ET Docket No. 95-18, *Third Report and Order and Third Memorandum Opinion and Order*, 18 FCC Rcd 23638, 23653-61 ¶¶ 29-44 (2003) (*MSS Third R&O*).

[275] *See 800 MHz R&O*, 19 FCC Rcd at 15094-95 ¶ 250. In that regard, the Commission further modified the MSS-BAS relocation plan to no longer require BAS licensees in TV markets 31-210 to cease operations on channels 1 and 2 (1990-2008 MHz and 2008-2025 MHz, respectively) until they have been relocated to the new band plan at 2025-2110 MHz. The Commission found that this modification was appropriate to accommodate Nextel's entry into the band under the adopted Nextel-BAS plan, which did not require BAS incumbents in markets 31 and above to cease operations on these two channels without receiving compensation prior to vacating the spectrum. *See id.* at 15102 ¶ 269.

[276] *See 800 MHz R&O,* 19 FCC Rcd at 15095-15100 ¶¶ 251-263.

[277] *See id,* 19 FCC Rcd at 15096 ¶ 253. The Commission subsequently extended this deadline by forty-five days to September 7, 2007. *See* Commission Seeks Comment on *Ex Parte* Presentations and Extends Certain Deadlines Regarding the 800 MHz Public Safety Interference Proceeding WT Docket No. 02-55, *Public Notice* (rel. Oct. 22, 2004) (*October 2004 Public Notice*).

coordination and interference problems, as well as any fixed BAS facilities, regardless of market size; and during stage two, Nextel will relocate BAS incumbents in all remaining markets.[278]

102. The Commission required Nextel and the BAS licensees to negotiate BAS relocation on two schedules, both tied to Nextel's stage one and stage two implementation.[279] The *800 MHz R&O* specified that mandatory negotiations in the stage one markets had to be concluded by July 15, 2005, and the mandatory negotiations in the stage two markets had to be concluded by May 15, 2006.[280]

103. The NAB, MSTV and the Society of Broadcast Engineers, Inc. (SBE) have jointly requested that the Commission extend the mandatory negotiation period for stage one BAS relocations to March 21, 2006, and for stage two relocations to March 21, 2007.[281] Nextel filed a petition for reconsideration in support of this request.[282] NAB, MSTV and SBE ask that the Commission adjust the schedule for mandatory BAS relocation negotiations by tying the schedule to the effective date of the *800 MHz R&O*, as reflected by the dates referenced above, thereby giving incumbent BAS licensees and Nextel sufficient time to negotiate and complete BAS relocation.[283] The parties claim that an extension is necessary because negotiations could only commence "after Nextel has accepted the license modifications and obligations set forth in the [*800 MHz R&O*]" and because the negotiation "clock" began before the *800 MHz R&O* became effective, which shortens the amount of time available for negotiation.[284] NAB, MSTV and SBE further claim that extending the mandatory negotiation periods

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[278] Stage-one relocations are to be completed within eighteen months and stage two within thirty months after the effective date of the *800 MHz R&O*. *See 800 MHz R&O*, 19 FCC Rcd at 15095 ¶ 251. The Commission subsequently extended these deadlines by forty-five days. *See October 2004 Public Notice*. For relocation purposes, BAS markets consist of Nielsen Designated Market Areas (DMAs) as they existed on June 27, 2000. *MSS Second R&O*, 15 FCC Rcd at 12329-30 ¶ 42.

[279] The Commission stated that MSS licensees may voluntarily join in these negotiations in order to relocate BAS operations in markets 31 and above and any fixed BAS operations, regardless of market size. We encouraged MSS licensees to work cooperatively with Nextel in these negotiations because all parties would collectively benefit from the expeditious relocation of BAS incumbents to the new band plan. *See 800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 258.

[280] The original deadlines were May 31, 2005 for stage one relocations and March 31, 2006 for stage two relocations. *See 800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 258. The Commission subsequently extended the mandatory negotiation periods to July 15, 2005 for stage one relocations and May 15, 2006 for stage two relocations. *See October 2004 Public Notice*.

[281] *See* Letter, dated Dec 2, 2004, from Lawrence A. Walke, National Association of Broadcasters (NAB), David L. Donovan, Association for Maximum Service Television (MSTV) and Christopher D. Imlay, Counsel for Society of Broadcast Engineers, Inc. (SBE) to Marlene H. Dortch, Secretary, Federal Communications Commission (NAB/MSTV/SBE Letter).

[282] *See* Nextel Petition for Clarification and/or Reconsideration dated Dec. 22, 2004 (*Nextel Petition*). We note that Nextel withdrew this petition except for the request to extend the Nextel-BAS mandatory negotiation deadlines as proposed by the broadcast industry parties. *See* Letter, dated Apr. 21, 2005, from James B. Goldstein, Senior Attorney, Government Affairs, Nextel, to Marlene H. Dortch, Secretary, Federal Communications Commission.

[283] NAB/MSTV/SBE Letter at 3.

[284] *Id.* at 2.

should not affect Nextel's other deadlines, *i.e.*, the actual completion of the BAS relocation process, filing progress reports, seeking reimbursement from MSS licensees, and filing the BAS relocation plan.[285]

104. We decline to extend the mandatory negotiation periods as the petitioners request. Nextel's acceptance of the license modifications, obligations and conditions set forth in the *800 MHz R&O* and subsequent decisions has now occurred and thus eliminates uncertainty regarding the timing of Nextel's BAS relocation obligations.[286] The Commission allotted adequate time for incumbent BAS licensees to prepare for relocation negotiations with new entrants (*e.g.*, MSS licensees and Nextel) in the 1990-2025 MHz band, including ample time to inventory their equipment and coordinate their relocation to the new channel plan at 2025-2110 MHz.[287] Moreover, since Nextel is required to complete the stage one relocation of BAS licensees by September 7, 2006 and the stage two relocation of BAS licensees by September 7, 2007, extending the mandatory negotiation periods to March 21, 2006 for stage one relocations and March 21, 2007 for stage two relocations would place the negotiation deadlines within six months of the deadlines for the actual completion of BAS relocation itself. We also are concerned that a six-month period may not be sufficient for Nextel to complete BAS relocation prior to Nextel's 800 MHz "true-up."[288] Absent sufficient time, Nextel could be prejudiced by the inability to claim credit for some BAS relocation expenses because those expenses could have occurred after the true-up date had passed. We therefore find that an extension of the mandatory negotiation periods is unnecessary and deny NAB, MSTV, SBE and Nextel's petitions for reconsideration.

105. Nextel, MSTV and NAB also filed a petition seeking a declaratory ruling, or alternately, clarification that Nextel will receive credit in the 800 MHz true-up process for the costs it incurs to relocate BAS operations licensed after June 27, 2000 but before November 22, 2004; and that BAS licensees will not be entitled to reimbursement for the cost of relocating equipment which is purchased to supplement existing facilities and which was acquired after November 22, 2004, with specific exceptions relating to the replacement or repair of malfunctioning equipment.[289] SBE and Window to the World Communications, Inc. (WTTW) filed ex parte comments in support.[290] As background, the Commission

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[285] *Id.* at 3.

[286] *See* Letter, dated Feb. 7, 2005, from Tim Donahue, President and Chief Executive Officer, Nextel, to Michael K. Powell, Chairman, Federal Communications Commission.

[287] Under involuntary relocation, a new MSS entrant may, at its own expense, make necessary modifications to or replace an incumbent licensee's BAS equipment such that the BAS licensee receives comparable performance from the modified or replaced equipment. However, under the mandatory negotiation periods adopted in the *MSS Third R&O*, the one-year mandatory negotiation period for MSS and BAS licensees in markets 1-30 and all BAS fixed stations, regardless of market size, has already passed. It ended on December 8, 2004. *See MSS Third R&O*, 18 FCC Rcd at 23659-60 ¶ 42.

[288] In the "true up" at the conclusion of 800 MHz band reconfiguration, Nextel will be credited for the cost of relocating BAS facilities, less the amount, if any, that MSS licensees reimbursed Nextel. *See 800 MHz R&O*, 19 FCC Rcd at 15114 ¶ 304.

[289] *See* Nextel/MSTV/NAB Request for Declaratory Ruling dated Jun. 20, 2005 (*Nextel/MSTV/NAB Request*).

[290] *See* SBE Jun. 29, 2005 *Ex Parte*; WTTW Jul. 7, 2005 *Ex Parte*. WTTW is the licensee of a noncommercial educational television station in the Chicago area.

decided in the MSS Second R&O that BAS facilities could continue to operate on a primary basis until relocated by MSS licensees provided that the receipt date of the initial application was prior to June 27, 2000 – the adoption date of the MSS Second R&O.[291] Initial applications filed after June 27, 2000 have been licensed on a secondary basis and this condition has been noted on the authorization issued by the Commission to the BAS licensee.[292] The Commission concluded that new entrants would not be required to relocate these operations because secondary operations, by rule, cannot cause harmful interference to primary operations nor claim protection from harmful interference from primary operations.[293]

106. While not required to do so, Nextel has voluntarily agreed to fund the relocation of the secondary BAS incumbents that were licensed after June 27, 2000 but before November 22, 2004, so long as it receives credit for these costs in the 800 MHz true-up process.[294] Nextel, MSTV, and NAB argue that, because Nextel is coordinating the BAS relocation on a market-by-market basis, there are public interest benefits to allowing Nextel to relocate these BAS licensees and to obtain credit for the relocation. Specifically, if there are few (or no) BAS incumbents left in a particular market that could interfere with or otherwise complicate the deployment of Nextel's operations in the band, it would help ensure that the BAS relocation is completed without complication by 2007, will minimize disruption to BAS operations, and will simplify negotiations with BAS incumbents.[295] Nextel, MSTV, and NAB argue that, because Nextel is coordinating the BAS relocation on a market-by-market basis, there are public interest benefits to allowing Nextel to relocate these BAS licensees and to obtain credit for the relocation. Specifically, if there are few (or no) BAS incumbents left in a particular market that could interfere with or otherwise complicate the deployment of Nextel's operations in the band, it would help ensure that the BAS relocation is completed without complication by 2007, will minimize disruption to BAS operations, and will simplify negotiations with BAS incumbents.[296] Nextel, MSTV and NAB also claim the costs of relocating these BAS licensees (which represent 5.5% of all BAS licensees that will be relocated) would be minimal (4.5% of the estimated total cost of BAS relocation).[297] In addition, Nextel,

[291] 47 C.F.R. § 2.106 Footnote NG 156. *See also MSS Second R&O*, 15 FCC Rcd at 12335, ¶ 59. This relocation process also applies to those BAS licenses meeting the cut-off date for which licensees filed subsequent facilities modification applications.

[292] Authorizations granted by the Commission after June 27, 2000 included the following language as a special condition: "In accordance with Paragraph 59 of the Commission's Second Report and Order and Second Memorandum Opinion and Order in ET Docket No. 95-18, and Section 2.106, Table of Frequency Allocations, footnote NG156, as amended, any new frequencies in or overlapping the 2008-2025 MHz frequency band are permitted only on a basis secondary to the Mobile-Satellite Service (MSS) and will be required to cease operation during Phase 2 of the relocation to accommodate MSS. Further, all new frequencies in or overlapping the greater 2008-2110 MHz frequency band will be required to relocate consistent with the Phase 1 and Phase 2 band plans adopted jointly by the BAS Frequency Coordinator and Existing Licensees of their Nielsen Designated Market Area, as described in Section 75.690(e), and will not be eligible for relocation by an MSS entity, but each licensee must prepare for such relocations at its own expense."

[293] 47 C.F.R. § 2.105(c).

[294] *Nextel/MSTV/NAB Request* at 3.

[295] *Nextel/MSTV/NAB Request* at 3.

[296] *Id.* at 3-4.

[297] *Nextel/MSTV/NAB Request* at 5.

MSTV and NAB note that MSS licensees would not be obligated to pay for any relocation of secondary BAS operations and Nextel would not seek reimbursement from MSS licensees for the costs to relocate these secondary BAS operations.[298]

107. We note that we do not alter the well established principle that secondary licensees are not entitled to relocation or reimbursement. Rather, the only issue we are considering here is whether to allow Nextel to obtain credit for the costs of relocating secondary BAS incumbents licensed before November 22, 2004 in the 800 MHz true-up process based on a voluntary relocation agreement between the parties. We find that the public interest is best served by Nextel's timely clearing of all incumbent operations in the 1990-2025 MHz band, which in turn will facilitate the timely transition of the 800 MHz band as well. Furthermore, the costs associated with relocating these secondary BAS licensees do not significantly alter the total costs associated with implementing the 800 MHz relocation plan. For these reasons, we will allow Nextel to claim credit for the costs to relocate secondary BAS incumbents licensed before November 22, 2004, as the parties have agreed. We note that MSS licensees will not be obligated to reimburse Nextel for the costs to relocate these secondary BAS licensees. Our decision today does not otherwise alter the relocation obligations of MSS licensees with respect to primary BAS incumbents, nor alter our overall relocation policy that secondary operations are not entitled to relocation or reimbursement from new entrants.

108. With respect to Nextel, MSTV and NAB's request for declaratory ruling or clarification that Nextel is not required to reimburse BAS licensees for the costs of "incremental" equipment acquired after November 22, 2004, unless acquired for replacement or repair, we find no action on our part is necessary at this time. The Commission has designed its relocation policy to allow the parties flexibility to negotiate relocation terms during the mandatory negotiation process, subject to the requirement to negotiate in good faith, and disagreements are best addressed on a case-by-case basis.[299] Because Nextel, the new entrant, and the various entities representing BAS incumbents have all agreed to interpret the Commission's comparable facility requirement for relocation in this manner, we find that, as a practical matter, there is no need for a resolution by the Commission when no disagreement is present.

2. TMI/TerreStar Petition for Clarification

109. Under the *800 MHz R&O*, Nextel is entitled to seek *pro rata* reimbursement for eligible costs incurred in clearing incumbent BAS licensees in the 1990-2025 MHz band from MSS licensees that commence operation anytime prior to the thirty-six month 800 MHz band reconfiguration period.[300] TMI and TerreStar jointly request that the Commission either "(i) relieve an MSS party that enters the market after Nextel's thirty-month BAS relocation period from having any reimbursement obligation to Nextel, or (ii) at a minimum, clarify that the MSS reimbursement obligation ends thirty-six months after the effective date of the [*800 MHz R&O*] *i.e.*, January 21, 2008."[301] These parties argue that it would be more equitable to tie the MSS reimbursement obligation to the thirty-month BAS relocation period than

[298] *Id.* at 6.

[299] *See* 47 C.F.R. § 101.73.

[300] *See 800 MHz R&O*, 19 FCC Rcd at 15099 ¶ 261.

[301] *See* TMI Communications Company (*TMI*) and TerreStar Networks (*TerreStar*) Joint Request for Clarification dated Dec. 22, 2004 at 2 (TMI/TerreStar PFR (of R&O)); *see also* TMI and TerreStar Reply to Nextel Opposition dated May 2, 2005 (TMI/TerreStar Reply).

to the thirty-six month 800 MHz band reconfiguration period.[302] Nextel contends, however, that the public interest is best served by "synchronizing the MSS reimbursement gation with the completion of 800 MHz reconfiguration and the true-up process established by the *[Hz R&O]*."[303] Nextel also contends that granting TMI and TerreStar's request would give MSS li es an "incentive to delay the initiation of service simply to avoid the reimbursement obligation."[304]

110. We first address TMI and TerreStar's argument that an MSS licensee that enters after Nextel's thirty-month BAS relocation deadline should be relieved of its reimbursement obligation to Nextel because Nextel would be receiving credit for its relocation costs in the 800 MHz true-up process in any event.[305] As noted in the *800 MHz R&O*, under the Nextel-BAS relocation plan, Nextel agreed to pay the upfront BAS relocation costs and requested that the Commission require MSS licensees in the 1990-2025 MHz band thereafter to pay their *pro rata* share of the cost of clearing this spectrum.[306] Nextel proposed that the payments by other entrants be made to the U.S. Treasury.[307] The Commission declined to adopt that proposal because it was inconsistent with the core objective of relocating BAS licensees to comparable facilities, an objective that is best met by allowing Nextel to relocate incumbent BAS licensees in a manner consistent with the Commission's existing rules that also allow MSS licensees to relocate BAS incumbents.[308] We see no benefit in a proposal that would relieve an MSS licensee from paying its established BAS relocation obligation simply because Nextel will be receiving credit for relocation costs at the end of the 800 MHz band reconfiguration process.

111. Further, as described in the *MSS Second R&O, 800 MHz R&O* and *AWS Sixth R&O*, the Commission has adhered to the cost sharing principle that the licensees that ultimately benefit from the spectrum cleared by the first entrant shall bear the cost of reimbursing the first entrant for the accrual of that benefit.[309] Thus, the initial entrant may seek reimbursement from subsequent entrants for the proportional share of the initial entrant's costs in clearing BAS spectrum at 1990-2025 MHz, on a *pro rata* basis according to the amount of spectrum other new entrants are assigned. The Commission assigned Nextel rights to five megahertz of spectrum, MSS entities rights to twenty megahertz of spectrum and AWS entities rights to ten megahertz of spectrum.[310] Under the equitable reimbursement calculus, Nextel, as the first entrant, is entitled to seek *pro rata* reimbursement of eligible clearing costs from subsequent entrants, including MSS licensees. Therefore: (a) the Nextel *pro rata* share represents

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[302] *See* TMI/TerreStar PFR (of R&O) at 5-6.

[303] *See* Nextel Opposition at 22.

[304] *Id.*

[305] *See* TMI/TerreStar PFR (of R&O) at 5-6.

[306] *See 800 MHz R&O,* 19 FCC Rcd at 15098 ¶ 260.

[307] *See* MSTV/NAB/Nextel May 3, 2004 *Ex Parte* at 8, submitted in WT Docket No. 02-55 and ET Docket Nos. 00-258 and 95-18.

[308] *See 800 MHz R&O,* 19 FCC Rcd at 15098 ¶ 260, n. 628.

[309] *See MSS Second R&O,* 15 FCC Rcd at 12336-38 ¶¶ 64-69; *800 MHz R&O,* 19 FCC Rcd at 15098-99 ¶¶ 259-62; *AWS Sixth R&O,* 19 FCC Rcd at 20753-54 ¶¶ 72-73.

[310] *See AWS Sixth R&O,* 19 FCC Rcd at 20754 ¶ 73.

the cost to relocate BAS licensees from one-seventh of the spectrum (reflecting that Nextel will have the use of five megahertz, or one-seventh of the thirty-five megahertz being cleared), (b) the MSS licensees' *pro rata* share, collectively, represents the cost to relocate BAS incumbents from four-sevenths of the spectrum, and (c) the AWS licensees' *pro rata* share, collectively, represents the cost of relocating BAS incumbents from two-sevenths of the spectrum (one-seventh for each five megahertz block).

112. In light of the unique circumstances surrounding Nextel's entry into the band, the Commission confined Nextel's reimbursement obligation so that it applies only to MSS licensees that enter the band prior to the end of the 800 MHz band reconfiguration period.[311] Nextel must pay all upfront costs and will receive credit for BAS relocation as part of the 800 MHz "true-up" process, less any reimbursement it receives from MSS and AWS licensees. However, once the "true-up" is completed, Nextel may not obtain reimbursement from subsequent entrants to the band.[312] Nextel's right to reimbursement is further constrained by the fact that it may obtain reimbursement only for the expenses it incurs for relocating non-fixed BAS incumbents in the top thirty markets and relocating all BAS incumbents' fixed facilities, regardless of the market size. Moreover, Nextel may only receive reimbursment for an MSS licensee's *pro rata* share of the 1990-2025 MHz spectrum.[313] Also, Nextel is obligated to reimburse MSS licensees for Nextel's *pro rata* share of the MSS licensees' relocation expenses, should the MSS licensee trigger involuntary relocation or otherwise participate in the relocation process before Nextel has completed its nationwide clearing of the band.[314] In limiting the amount of Nextel's reimbursement in this manner, the Commission struck an appropriate balance that is not unreasonably burdensome on either Nextel or the MSS licensees,[315] and we have not been shown how this equitable apportionment process intrudes on the rights of any affected licensee. We therefore deny that part of the TMI/TerreStar petition for reconsideration that seeks reversal of the reimbursement procedures established in the *800 MHz R&O*.

113. We now address TMI and TerreStar's request to clarify that the MSS reimbursement obligation ends thirty-six months after the effective date of the *800 MHz R&O* and not the end date of the thirty-six month 800 MHz band reconfiguration process.[316] The Commission decided to end the reimbursement obligations of other entrants to Nextel, and any reimbursement by Nextel to other entrants, at the end of the 800 MHz band true-up period for administrative efficiency in the accounting process and because of the unique circumstances in Nextel's receipt of BAS spectrum. To address potential MSS licensees' concerns of uncertainty regarding their reimbursement obligations to Nextel, the Commission required Nextel to inform the Commission and MSS licensees, twelve months after the effective date of the *800 MHz R&O*, whether or not it will be seeking reimbursement from the MSS

[311] *See 800 MHz R&O*, 19 FCC Rcd at 15099 ¶ 261.

[312] *Id.*

[313] *Id.*

[314] *See id.*, 19 FCC Rcd at 15099 ¶ 262.

[315] Under the MSS plan, MSS licensees are required to clear the top thirty BAS markets and all fixed BAS stations, regardless of market size, before beginning operations. However, the accounting among MSS licensees to settle relocation expenditures would not occur until after the end of the MSS relocation process. *See MSS Second R&O*, 15 FCC Rcd at 12338 ¶ 68.

[316] *See* TMI/TerreStar PFR (of R&O) at 6-8; TMI/TerreStar Reply at 3-6.

licensees.[317] Further, under traditional reimbursement procedures, including those applied among the MSS licensees and outlined in the *MSS Second R&O*, reimbursement obligations run for a much longer period of time, until the requirement for relocation sunsets.[318] We therefore deny TMI and TerreStar's request to tie the MSS obligation to reimburse Nextel for the MSS *pro rata* share of BAS clearing costs to Nextel's thirty-month BAS relocation timeframe or, alternatively, to a time period that ends thirty-six months after the effective date of the *800 MHz R&O* and maintain the schedule previously established, *i.e.*, the true-up period.

114. In comments filed in response to Nextel's BAS Relocation Schedule and Implementation Plan,[319] TMI and TerreStar request that the Commission require Nextel to remedy certain "information deficits in Nextel's relocation plan," such as the lack of detail on the BAS facilities to be relocated, the absence of firm relocation dates by market, and the lack of relevant financial data.[320] While we recognize that an MSS licensee—a co-entrant in the 1990-2025 MHz band with its own relocation and reimbursement obligations to BAS incumbents—may have legitimate concerns on the adequacy of detailed relocation and financial information, we find that TMI and TerreStar's request is too speculative and premature to warrant Commission action at this time. We expect Nextel to work cooperatively with MSS licensees because all parties would collectively benefit from the expeditious relocation of BAS incumbents to the new band plan, and note that TMI and TerreStar offer no evidence that Nextel has denied requests for information from, or has been otherwise uncooperative with, MSS licensees. We anticipate that both Nextel and MSS licensees would jointly seek clarification from the Commission on matters that the parties are unable to resolve during such discussions. We note that MSS licensees may voluntarily join in the negotiations between Nextel and BAS incumbents in order to relocate BAS operations in markets 31 and above as well as any fixed BAS operations, regardless of market size.[321] Participation in the negotiations by MSS licensees may address some of the concerns raised by TMI and TerreStar. Further, MSS licensees retain the option of accelerating the clearing of those markets so that they could begin operations before Nextel has completed nationwide clearing. The one-year mandatory

[317] This deadline coincides with the date Nextel is required to submit its first status report on its BAS relocation efforts. We note that the *October 2004 Public Notice* extended this deadline by forty-five days.

[318] As noted above, under the MSS plan, the accounting among MSS licensees to settle relocation expenditures would not occur until after the end of the MSS relocation process. *See* n. 315 *supra*. *See also MSS Second R&O*, 15 FCC Rcd at 12338 ¶ 68.

[319] In the *800 MHz R&O*, the Commission required Nextel to file with the Commission and copy the MSS licensees, within thirty days after the effective date of the *800 MHz R&O*, its plan for the relocation of BAS operations in the markets that will be relocated during stage one (*i.e.*, within eighteen months). MSS licensees had thirty days to review the Nextel plan and identify to Nextel and the Commission those top thirty TV markets and fixed BAS operations, if any, for which they intend to invoke involuntary relocation. *See 800 MHz R&O*, 19 FCC Rcd at 15097-98 ¶ 257. Nextel submitted its BAS relocation schedule and implementation plan on April 6, 2005. *See* Nextel BAS Relocation Schedule and Implementation Plan dated April 6, 2005. TMI and TerreStar submitted joint comments on the Nextel plan on May 6, 2005. *See* Comments of TMI Communications Company (*TMI*) and TerreStar Networks (*TerreStar*) on the Nextel BAS Relocation and Implementation Plan dated May 6, 2005 (TMI/TerreStar Comments).

[320] *See* TMI/TerreStar Comments at 9-13.

[321] *See 800 MHz R&O*, 19 FCC Rcd at 15098 ¶ 258. We also noted that we would entertain requests filed by MSS licensees requesting that their voluntary participation in the negotiations between Nextel and BAS incumbents initiate their mandatory negotiation period. *Id.*